

New York State Issues New Guidance Clarifying Eligibility for COVID-19 Leave

On January 20, 2021, the New York State Department of Labor issued new [guidance](#) on the State's COVID-19 leave law, which requires that employers provide up to fourteen days of job-protected leave to eligible employees who are subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19. The new guidance supplements other guidance previously issued by the State, which remains in effect.

As we discussed in our prior [alert](#), in March 2020, Governor Cuomo signed into law legislation providing all New York employees with COVID-19-related sick leave, as well as expanded access to New York Paid Family Leave ("PFL") and New York statutory short-term disability benefits. Under the March 2020 legislation, employees are eligible for job-protected sick leave when they are unable to work (or work remotely) due to a "mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any government entity duly authorized to issue such order due to COVID-19." The amount of sick leave available to an employee, and whether it is paid or unpaid, varies on the size and profitability of the employer. The law mandates that smaller employers provide either unpaid sick leave or a combination of unpaid sick leave and paid sick leave. Employers with 100 or more employees are required to provide up to fourteen days of paid sick leave during the pendency of the quarantine order.

The new guidance clarifies that an employee who receives a positive diagnostic test for COVID-19 and is subject to quarantine or a period of isolation is entitled to up to three discrete periods of leave under the State's COVID-19 sick leave. Following an initial period of leave (which may or may not be based on a positive COVID-19 diagnostic test), the second and third periods of leave must be based on a positive COVID-19 diagnostic test, rather than merely having close contact with or potential exposure to someone with COVID-19. Additionally, to qualify for a subsequent period of leave, the employee must submit documentation from a licensed medical provider or testing facility substantiating that the employee has tested positive for COVID-19 (unless the positive test result was the result of an employer administered COVID-19 test).

In addition to clarifying that leave may be taken multiple times, the guidance also establishes that if an employer requires that an employee (who is not otherwise subject to a mandatory or precautionary order of quarantine or isolation) remain out of work due to exposure or potential exposure to COVID-19, the employer must continue to pay the employee at the employee's regular rate until the employer permits the employee to return to work or the employee becomes subject to a mandatory or precautionary order of quarantine or isolation. If and when the employee becomes subject to such an order of quarantine or isolation, then the employee must receive sick leave as required by the State's COVID-19 sick leave. The guidance suggests that, in this situation, the initial period that the employer required the employee to remain out of work is merely a salary or wage continuation period and does not exhaust one of the three periods of sick leave to which an employee is entitled under the State's COVID-19 sick leave law.

The guidance also notes that employees who return to work following a period of mandatory quarantine or isolation do *not* need to be tested before returning to work, except for nursing home staff. Indeed, the guidance suggests that an employee does *not* need to be tested to discontinue isolation or quarantine. However, an employee who was subject to an order of quarantine or isolation and continues to test positive for COVID-19 after the end of such quarantine or isolation period must not report to work, and will be deemed to be subject to a new mandatory order of isolation from

the Department of Health and will be entitled to a subsequent period of State COVID-19 sick leave.

Importantly, eligible employees may still qualify for New York State's COVID-19 leave even as Congress has elected not to reauthorize the expanded leave provisions of the Families First Coronavirus Response Act ("FFCRA"). Employers who *voluntarily* extend FFCRA leave remain eligible to claim a tax credit for FFCRA leave voluntarily provided to employees until March 31, 2021.

We will continue to closely monitor developments in this area.

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